

Secondly, the Examiner takes the position that the claims are directed to patentably distinct species based upon the type of polymer used in the composition. The Examiner requested that the Applicants elect one of the polymers listed in Claim 2 for initial examination. From this group, Applicants hereby elect hydroxypropylmethyl cellulose, but this election is also made with traverse and is solely for the purpose of advancing prosecution of this case.

The claims believed to be readable upon the elected species are as follows:

<u>Elected Species</u>	<u>Corresponding Claims</u>
Clarithromycin	1 – 20
Hydroxypropylmethyl cellulose	1 – 20

With respect to both of the election of species requirements, the requirement is respectfully traversed because it is believed that the prior art searching for the respective species will significantly overlap. For example, while the antibiotics recited in Claim 5 (erythromycin, azithromycin, clarithromycin, fluoroquinolones, cephalosporins, tetracyclic antibiotics) may be distinct species in the context of the invention, it is believed that a prior art search directed to one of the antibiotics will require searching much of the same prior art as the other antibiotics.

A similar situation exists with the different species of polymers recited in Claim 2 (hydroxypropylmethyl cellulose, hydroxypropyl cellulose, hydroxyethyl cellulose, methyl cellulose, carboxymethylethyl cellulose, sodium carboxymethyl cellulose, ethylcarboxyethyl cellulose, polyvinylalcohol, sodium alginate, polyvinylpyrrolidone, vinyl acetate/crotonic acid copolymers, methacrylic acid copolymers, methyl methacrylic ester copolymers, maleic anhydride/methyl vinyl ether copolymers, poly(ethylene oxide)). Here again, a prior art search directed to one of the polymers will require searching much of the same prior art as the other polymers.

Moreover, an election of species, which is a type of restriction, is not "required" by 35 U.S.C. §121 as suggested by the Examiner. Congress wisely gave the Commissioner the

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"discretion" to require restriction. According to 35 U.S.C. § 121 "... the Commissioner may require the application to be restricted...." (emphasis added). Likewise, the MPEP § 803 lists two criteria that must be present for restriction to be proper:

- 1) The invention must be independent or distinct; and
- 2) There must be a serious burden on the Examiner if restriction is not required (emphasis added).

Because the Examiner has not shown any serious burden if examination of all the species is conducted and the species cover related subject matter, Applicants respectfully request the Examiner reconsider and withdraw the election of species requirements and examine Claims 1 – 20 in their entirety.

In the event this response is not timely filed, Applicants hereby petition for the appropriate extension of time and request that the fee for the extension along with any other fees which may be due with respect to this paper be charged to our Deposit Account No. 12-2355.

Respectfully submitted,

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